No. 600

In the Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, TRUSTEE UNDER WILLS OF R. J. REYNOLDS AND KATHARINE S. JOHNSTON, ETC.; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The findings and opinion of the Board of Tax Appeals (R. 1–31) are reported in 42 B. T. A. 145. The opinion of the Circuit Court of Appeals (R. 41–54) is reported in 121 F. (2d) 307.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 10, 1941 (R. 54–55). The petition for a writ of certiorari was filed on September 10, 1941, and granted on October 27, 1941.

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Decedent was the beneficiary of three trusts created by his parents. During the decedent's life, the income of each trust was either to be paid to him or to be accumulated. At his death, the property was to go to the person or persons to whom the decedent, in his sole discretion, might appoint by will. In default of appointment, the property of each trust was to go to his descendants or, if none, to his brother and sisters. Under the terms of one of the trusts, decedent was to receive the corpus outright upon attaining the age of 28. Decedent died at the age of 20 without having validly exercised his powers of appointment. Did the decedent at the time of his death have such an "interest" in the trust property as to require its inclusion in his gross estate under Section 302 (a) of the Revenue Act of 1926?

2. The decedent left a will by which he sought to appoint the trust property to his brother and sisters. The validity of the will was challenged and the will has never been probated. The decedent's brother and sisters, asserting a right to take as appointees under the will as well as a right to take under the gift-over provisions of the trusts if the will was invalid, obtained a substantial share of the trust property pursuant to a

judicially approved compromise. Is all or any part of the amount obtained by the brother and sisters in settlement to be considered as having passed under exercised powers of appointment and therefore includible in decedent's gross estate under Section 302 (f) of the Revenue Act of 1926, as amended?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *
>
> (f) [as amended by Section 803, Revenue Act of 1932, c. 209, 47 Stat. 169] To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after death, or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or

enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth;

* * * * *

(U. S. C., Title 26, Sec. 811.)

The applicable Treasury Regulations will be found in the Appendix, *infra,* pp. 59–66.

STATEMENT

The facts, insofar as relevant to the two issues raised in the court below and presented by the petition for a writ of certiorari,[1] are not in dispute. They may be summarized as follows:

1. *Facts with respect to the first issue.*—The decedent, Zachary Smith Reynolds, was the beneficiary of three trusts, one created under the will of his father, R. J. Reynolds, probated in 1918, one created by deed of trust executed by his mother, Katharine S. Johnston (formerly Reynolds), in 1923, and one created by the will of his mother probated in 1924. Under the trust created by his father, decedent was to receive only a portion of the income until he reached the age of 28, the remainder of the income to be added to the corpus of the trust. Upon attaining the age of

[1] Certain contentions which the Government advanced before the Board of Tax Appeals, and which are discussed in the Board's opinion (R. 12 *et seq.*), were abandoned in the court below. In that court, the Government pressed only the two questions now before this Court for review (R. 42).

28, he was to receive the trust property outright, together with all accumulated income.[2] Under the trusts created by his mother, decedent was to enjoy the income of the property for life, with certain restrictions as to the payment of income to him before he attained the age of 28. Any income not paid to him or for his benefit before he reached 28 was to be added to the corpora of the trusts.[3] No one other than decedent had any right to or interest in any of the trust income during decedent's life. (R. 2–5.)

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[2] Under the terms of the will of decedent's father the income from decedent's trust, to the extent deemed necessary, was to be devoted to his support, maintenance, and education until he reached 21. Between the ages of 21 and 28, decedent was to receive between $5,000 and $50,000 per year, according to his mother's discretion, or $50,000 per year if his mother were not living. Also, between those ages, decedent was to receive, out of principal if necessary, two dollars for every dollar made or saved by him. Income not distributed was to be accumulated in the trust, for distribution to him (along with the corpus) when he attained the age of 28 (R. 59–60).

[3] The will of decedent's mother provided that until decedent reached the age of 21, the income from his trust was to be devoted to his support and education, according to the discretion of his guardians. Between the ages of 21 and 28 the income was to be paid to him or for his benefit according to the discretion of the trustees. Under the deed of trust executed by his mother, none of the income was to be distributed to the decedent until he reached the age of 28. Both the mother's will and deed of trust directed that the trust income should be paid to decedent during his life after he reached 28, and that income accruing before that time and not distributed to him should be added to the corpus (R. 68–69, 73–74).

In the case of all three trusts, decedent was given a general power of appointment over the trust property, exercisable by will in favor of any person or persons he might in his sole discretion select. In default of the exercise of the power of appointment, the trust property was to go to decedent's descendants, if any, or if he had no descendants to his brother and sisters and their issue *per stirpes*. (R. 3-5.)[4]

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[4] Under the will of decedent's father the complete limitation in case of decedent's death under twenty-eight reads as follows (R. 60-61):

"(7) Should any of my children die before he or she shall arrive at the age of twenty-eight (28) years, then the share of my estate which would have been payable to him or her, had he or she arrived at that age, shall be continued to be held by my said Trustee for the use and benefit of his or her devisees by Will until the time that such child would have arrived at the age of twenty-eight years, if he or she had lived, when the said trust shall cease and the estate shall then become payable to such devisees, the Trustee, however, paying in the meanwhile the income from said share to them; but should any of my children die before that time without having disposed of his or her share by Will but leaving issue by him or her surviving, the share of said deceased child shall continue to be held by my said Trustee for the use and benefit of his or her children living at his or her death, paying unto them or applying so much of the net income of the share of my child so dieing as said Trustee may deem necessary for their support and maintenance and accumulating the balance until the time my child so dieing would have arrived at the age of twenty-eight years, if he or she had lived, when the trust shall cease and the estate shall then become vested in his or her children, then surviving; and, should any of my said children die without having made a testamentary disposition of his or her share of my said estate and without issue living at the termination of said

Decedent died on July 6, 1932, about four months before he would have attained the age of 21. He was then domiciled in North Carolina and, under the laws of that state, was incapable of disposing of property by will because of his minority. (R. 5, 21.)

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trust, then his or her share shall be held on like trusts for my surviving children and the then living issue of my deceased children per stirpes; and should all of my children and their issue die before the termination of the trusts, then, in that event, one-half of the trust estate in value at that time, principal and income shall go to and belong to my said wife, and the other half to my brothers and sisters then living and the descendants then living of any of my deceased brothers and sisters, per stirpes."

The basic trust limitation in the mother's trust deed reads as follows (R. 73–74):

"The Safe Deposit & Trust Company of Baltimore as Trustee hereunder shall hold the share of each child for such child during its life, and upon its death shall distribute, transfer, and deliver the same to and among, or hold the same for such person or persons, objects or purposes, in trust and otherwise, as such child shall by its Last Will nominate and appoint to take the same, and in default of such appointment shall distribute, transfer and deliver the same to the descendants of such child living at its death, per stirpes and not per capita, and in default of such appointment and in default of descendants of such child the said Trustee shall at its death divide and distribute the same among such of said children and their descendants as are then living, per stirpes and not per capita, but the shares of such of her said children as are then living shall be held by said Trustee in trust for them and upon the same trusts that their original shares are then held."

The limitation in the mother's will is the same, except that in event of decedent's death without descendants, his stepfather is to share with his brother and sisters (R. 68–69).

2. *Additional facts with respect to the second issue.*—Decedent was twice married, first to Anne Cannon and thereafter to Libby Holman. He left surviving him a child by the first marriage, Anne Cannon Reynolds II (hereinafter sometimes called the Cannon child), and a posthumous child by the second marriage, Christopher Smith Reynolds (hereinafter sometimes called the Holman child). (R. 6–9.)

After decedent had been separated from his first wife, he entered into a settlement with her, by which two trust funds of $500,000 each were set up for her and the child. The judgment embodying this settlement barred the wife and child from making any further claims for financial support against the decedent and from any participation in decedent's trusts. Subsequently, on November 23, 1931, Anne Cannon Reynolds obtained a divorce at Reno, Nevada. Six days later decedent married Libby Holman. (R. 7–8.)

A few months before his divorce, decedent, while temporarily staying in New York, executed a purported will with three witnesses, in which he attempted to exercise his powers of appointment in favor of his brother and sisters. In this will, decedent declared that he had adopted and acquired a domicile in New York and that he intended to make it his permanent home. (R. 7.)

After decedent's death, claims were asserted to the trust property by the Cannon child, by the Holman child, and by the decedent's brother and sisters. The validity of the decedent's divorce from Anne Cannon, the validity of the judgment barring Anne Cannon and her child from participation in the trust property, and the validity of the New York will were all contested issues (R. 9-11). Decedent's brother and sisters urged that they were entitled to the trust property because the New York will was valid and in that will decedent had exercised his powers of appointment in their favor (R. 9-10, 114-117). They further urged that, even if the New York will was invalid, they were entitled to the trust property under the gift-over provisions of the trusts. This last contention was based on the theory that the Cannon child was excluded from taking because of the judgment mentioned above and that the Holman child was excluded from taking because decedent's divorce from Anne Cannon was invalid and the Holman child therefore illegitimate (R. 9).

Extensive litigation ensued in the North Carolina state courts to determine the validity of the various claims to the trust property. See *In Re Reynolds,* 206 N. C. 276; *Reynolds* v. *Reynolds,* 208 N. C. 578 (R. 76-130). A compromise was finally reached under which, after the payment of $2,000,000 to the State of North Carolina to settle

its claim for inheritance taxes, $37\frac{1}{2}$ percent of the remainder was allotted to the Cannon child, 25 percent was allotted to the Holman child, and $37\frac{1}{2}$ percent was allotted to decedent's brother and sisters. Seven hundred fifty thousand dollars was paid to the brother and sisters to be turned over to Libby Holman. The North Carolina Superior Court confirmed the compromise and its judgment was affirmed by the North Carolina Supreme Court. (R. 10–11.)

The Safe Deposit & Trust Company of Baltimore, trustee of each of the trusts, had instituted equity proceedings in the Circuit Court of Baltimore City, seeking protection with respect to any distribution of the trust property. After all interested parties, including the executor named in the New York will, had been brought in, that court entered a decree affirming the compromise which the North Carolina court had approved and directing that it be carried out. The executor named in the New York will was subsequently discharged from any duty to probate the will in New York or defend it in the Maryland proceedings. (R. 11–12.)

3. *Action of the Commissioner.*—The estate tax return filed on behalf of decedent's estate did not include any part of the trust property in the gross estate. The Commissioner determined that the entire value of the trust property should be included and accordingly assessed a deficiency in estate tax of $8,520,820.55, less any credit for inheritance

taxes paid to the State of North Carolina (R. 2, 12).[5] The Board of Tax Appeals held this action of the Commissioner to be erroneous (R. 31–32). The Commissioner appealed, limiting his appeal to the two questions now before this Court. The court below rejected the Government's contentions on both issues and affirmed the decision of the Board (R. 42–55).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that decedent did not have an interest in the corpus of each of the trusts created for him by his parents which was taxable as part of his gross estate under Section 302 (a) of the Revenue Act of 1926.

2. In holding that no part of the corpora of the trusts should be included in gross estate under Section 302 (f) of the Revenue Act of 1926, as amended, as having in effect passed under powers of appointment exercised by decedent.

3. In affirming the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

The decedent had an "interest" in the trust property within the meaning of Section 302 (a)

[5] Since $2,000,000 was paid to the State of North Carolina for inheritance taxes, the principal amount of the deficiency is approximately $6,520,000; when interest is added, the amount involved in this case becomes nearly $10,000,000.

of the Revenue Act of 1926, and the value of that property was therefore properly included by the Commissioner in decedent's gross estate.

A. This Court has frequently ruled that one who has all the substantial attributes of ownership of property, although no title thereto, is to be treated as the owner of the property for tax purposes. This rule is based on the unassailable assumption that Congress, in enacting the revenue laws, intends tax consequences to depend upon the substance of things and not upon the "niceties of the law of trusts and conveyances." *Helvering* v. *Clifford*, 309 U. S. 331, 334. That rule is fully applicable to Section 302 (a), for this Court has consistently recognized that the criterion for imposition of the estate tax is the transfer of the economic benefits of property at the decedent's death and not the mere passage of a technical legal or equitable title. See, *e. g., Klein* v. *United States*, 283 U. S. 231, 234; *Helvering* v. *Hallock*, 309 U. S. 106, 111; cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 43.

The court below disregarded these controlling principles. It held that Congress, in enacting Section 302 (a), intended to tax only the devolution of property owned by the decedent and which passed at his death by will or intestacy, and that since, under state law, decedent had no legal or equitable title to the trust property and it therefore did not pass as part of his estate, it was not

taxable to his estate under Section 302 (a). The court refused to consider whether the decedent's "bundle of rights" in the trust property (see *Helvering* v. *Clifford, supra*, at 337) gave him the same rights of enjoyment and disposition as an owner; in the view of the court, it was decisive that, under state law, no single one of decedent's rights, considered separately, conferred upon decedent any technical legal or equitable title.

This construction of the statute accords neither with the literal language nor the legislative history of Section 302 (a). Had Congress intended to tax only the transfer of title to property which passes as part of the decedent's estate, it would scarcely have used the word "interest" as the sole statutory test—a word completely inapt if intended to connote only legal or equitable titles. From 1916 until 1926, the statute was in fact confined to property interests of the decedent which were "subject to distribution as part of his estate"; in the Revenue Act of 1926, however, Congress deleted this provision. To construe the statute as did the court below, therefore, is to read into it a limitation for which Congress not only failed to provide but which it saw fit specifically to eliminate. Furthermore, the construction of the statute adopted by the court below leaves unanswered the critical question of why Congress would have wanted to draw a distinction for tax purposes between an owner of property and a per-

son having substantially the same rights of enjoyment and disposition as an owner, although not his legal title.

E. At the time of his death, decedent did possess substantially all the attributes of ownership of the trust property:

(1) He had an exclusive lifetime enjoyment of the property, subject only to a restraint on alienation and restrictions on the use of income until he reached the age of 28.

(2) He had, in addition, an unrestricted power of testamentary disposition, including the power to appoint the property to his own estate or to his creditors. Such a power to bestow his property upon any person he chooses is the only attribute of ownership available even to an absolute fee owner "at the time of his death"—the determinative time under the statute. This court has frequently stated that "for purposes of taxation, a general power of appointment * * * [is] equivalent to ownership of the property subject to the power" (*Curry* v. *McCanless*, 307 U. S. 357, 371, and cases cited; *Graves* v. *Elliott*, 307 U. S. 383, 386), and has specifically pointed out that "the nonexercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death." *Chase National Bank* v. *United States*, 278 U. S. 327, 338.

(3) Finally, decedent had the assurance that if he failed effectively to exercise his testamentary powers of appointment, the property would go to

members of his immediate family who were the natural objects of his testamentary bounty, namely, his children, or, if none, his brother and sisters. Such a gift-over provision is comparable to the provision of law for the distribution of property in the event of the death of an absolute fee owner intestate.

Because of this "bundle of rights" possessed by the decedent, we think it plain that the attributes of ownership which he had at the time of his death were substantially the same as though he had been given a fee title to the trust property, subject to a restriction on alienation and limitations as to the use of the income, and that, therefore, under the rationale of the *Clifford* case, decedent was properly treated as the owner of the property for purposes of Section 302 (a).

C. There is nothing in the structure or legislative history of the estate-tax law, or in the decisions construing it, which prevents application of the *Clifford* rule to the present case.

(1) The legislative history of Section 302 refutes the view, expressed by the court below, that the specific provision of Section 302 (f) for the taxation of property passing pursuant to the exercise of a power of appointment indicates that Congress did not intend to tax property subject to an unexercised power. To sustain the view of the court below in this respect, respondents must contend that Congress did not intend the combination of rights possessed by this decedent to

constitute an "interest" within Section 302 (a) because when it amended Section 302 (a) so as to broaden its scope and to make it susceptible of literal application to such a combination of rights, it failed at the same time to strike out the previously enacted provision of Section 302 (f) which covered part of the same field. Such a contention does not accord with the realities of the law-making process.

(2) *United States* v. *Field*, 255 U. S. 257, the principal authority relied upon by the court below, is distinguishable, for the statutory provision there under consideration was far narrower in scope than Section 302 (a) as it appears at present. *Helvering* v. *Grinnell*, 294 U. S. 153, and *Morgan* v. *Commissioner*, 309 U. S. 78, likewise relied upon by the court below, involved the interpretation of Section 302 (f); no contention was made in either of those cases with respect to the proper construction of Section 302 (a).

II

If Section 302 (a) is inapplicable here, nevertheless some part of the trust property should be included in decedent's gross estate as having passed under an exercised general power of appointment within the meaning of Section 302 (f). The record clearly reveals that decedent's brother and sisters obtained 37½% of the trust property in a compromise, in part, at least, by asserting that the powers of appointment were validly ex-

ercised in their favor. Under the doctrine of *Lyeth* v. *Hoey,* 305 U. S. 188, that part of the trust property so obtained must be deemed to have passed to them under exercised general powers. The case should be remanded to the Board of Tax Appeals for a determination of the value of that part.

ARGUMENT

I

THE VALUE OF DECEDENT'S INTEREST IN THE TRUST PROPERTY IS INCLUDIBLE IN HIS GROSS ESTATE UNDER SECTION 302 (a) OF THE REVENUE ACT OF 1926

1. THE ISSUE BEFORE THE COURT

Section 302 (a) of the Revenue Act of 1926, as amended, provides for the inclusion in the gross estate of the decedent of the value at the time of the decedent's death of all property—

> (a) To the extent of the interest therein of the decedent at the time of his death; * * *

The question in this case is whether the rights which the decedent possessed in and to the trust property constituted an "interest" in that property "at the time of his death" within the meaning of this provision.

The nature of decedent's rights is not in dispute, nor can there be any real question that they gave him substantially all of the attributes of ownership of the trust property. We analyze these rights in detail below, but they may be summarized

briefly as follows: All the income from the trust property was either to be paid to the decedent currently or accumulated; upon attaining the age of 28 decedent would receive the corpus of one trust outright and beginning then and continuing for the rest of his life he would receive the entire income of the other two. At the moment of his death he possessed a general power to dispose of the trust property and all accumulated income to whomsoever he chose, including his own estate or creditors. If he failed to exercise the power, the property would pass to his next of kin—his children for whom it was his moral obligation to provide, or, if none, his brother and sisters.

It is apparent, therefore, that decedent, to the exclusion of all other persons, could enjoy the fruits of the trust properties and dispose of their substance at his death. The only real difference between his position and that of an absolute fee owner was that his ownership was subject to spendthrift provisions—restraints on alienation during his first 28 years (or, as to two trusts, during his life), and partial limitations on enjoyment of the income during his first 28 years. But at the moment of his death decedent's situation could not be distinguished from that of a legal fee owner, for his unlimited power of disposition at that moment gave him all the rights which a holder of an absolute fee title would have had.

The court below considered the foregoing facts immaterial. It held that Congress, in enacting

Section 302 (a) of the Revenue Act of 1926, intended to tax only the devolution of property owned by the decedent and which passed at his death by will or intestacy, and that since, under state law, decedent had no legal or equitable title to the trust property and it therefore did not pass as part of his estate, it was not taxable to his estate under Section 302 (a). The court refused to consider whether the decedent's "bundle of rights" in the trust property (see *Helvering* v. *Clifford,* 309 U. S. 331, 337) gave him the same rights of enjoyment and disposition as an owner; in the view of the court, it was decisive that, under state law, no single one of the decedent's rights, considered separately, conferred upon decedent any technical legal or equitable title which passed upon his death by will or intestacy.

The issue is thus sharply posed. Does the word "interest" as used in Section 302 (a) refer only to property of which the decedent is technically the owner, as the court below held, or does it also comprehend, as we contend, interests in property which give a decedent all the substantial attributes of ownership of that property but not technical title thereto?

The issue is an important one. Trust provisions of the type involved in this case, combining a life estate,[8] a testamentary power of dis-

[8] One of the trusts was to terminate when the decedent reached the age of 28, at which time he was to be given the corpus outright.

position in the life beneficiary, and a gift-over provision in favor of the life beneficiary's children and next of kin in the event of non-exercise of the power of appointment, are in constant use. They are specifically designed to confer upon the life beneficiary all the substantial attributes of ownership of the trust property, except the power of alienation during his lifetime, while still withholding from him technical title to the property. To hold, as did the court below, that this device successfully avoids the impact of the estate tax law is, therefore, to sanction a method by which ownership benefits can be enjoyed by a decedent during his life without the imposition of corresponding estate tax obligations upon his death. We do not believe that Congress intended any such easy method of avoidance of the normal tax consequences of the transfer of the economic benefits of property upon a decedent's death, or that this result is either required or justified by the language of the statute.

2. ONE WHO HAS ALL THE SUBSTANTIAL ATTRIBUTES OF OWNERSHIP OF PROPERTY MUST BE TREATED AS ITS OWNER FOR TAX PURPOSES

The decision of this Court in *Helvering v. Clifford,* 309 U. S. 331, is persuasive authority in favor of the Government's position. There the Court held that the grantor of a short-term trust, of which the grantor's wife was the beneficiary, was taxable on the trust income because of the

many attributes of ownership which he had retained. The teaching of the case, as of many other recent decisions of this Court, is that one who is substantially the owner of property is to be treated as its owner for tax purposes, even though legal title may be vested in another. See also *Helvering* v. *Horst*, 311 U. S. 112; *Harrison* v. *Schaffner*, 312 U. S. 579; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 42–43; *Burnet* v. *Guggenheim*, 288 U. S. 280, 283.

This fundamental rule for the construction of tax statutes is based on the assumption, which we believe to be unassailable, that Congress, in enacting the revenue laws, intends tax consequences to depend upon the substance of things and not upon the "niceties of the law of trusts or conveyances." *Helvering* v. *Clifford, supra,* at 334. This rule is fully applicable to the estate tax law.[7] It cannot with realism be supposed that Congress, when it enacted the estate tax, was concerned with technical considerations of real property law. Rather, it was seeking to impose tax consequences

[7] See *Helvering* v. *Hallock*, 309 U. S. 106; *Chase National Bank* v. *United States*, 278 U. S. 327, 335; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345; *Tyler* v. *United States*, 281 U. S. 497, 503; *Klein* v. *United States*, 283 U. S. 231; *Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160; *Gwinn* v. *Commissioner*, 287 U. S. 224, 229; *Porter* v. *Commissioner*, 288 U. S. 436; *Third National Bank & Trust Co.* v. *White*, 287 U. S. 577; *Helvering* v. *Bowers*, 303 U. S. 618; *Foster* v. *Commissioner*, 303 U. S. 618; *United States* v. *Jacobs*, 306 U. S. 363, 371; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271.

upon all transfers of property interests, however characterized under state or common law, whereby the economic benefits of the property shifted from the decedent to another by reason of the decedent's death. As this Court stated in *Estate of Sanford* v. *Commissioner, supra,* at 43, with respect to the gift tax, "Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title." See also *Chase National Bank* v. *United States,* 278 U. S. 327, 338; *Graves* v. *Elliott,* 307 U. S. 383; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 345; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271; *Helvering* v. *Hutchings,* 312 U. S. 393, 396; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Burnet* v. *Guggenheim,* 288 U. S. 280, 287; *Tyler* v. *United States,* 281 U. S. 497, 503–504; *United States* v. *Jacobs,* 306 U. S. 363.

It is our position, then, that the controlling tax event for purposes of the estate tax is the transfer to another, by reason of the decedent's death, of the possession and enjoyment of property of which decedent, at the time of his death, had the benefits of ownership. See *Klein* v. *United States,* 283 U. S. 231, 234; *Helvering* v. *Hallock,* 309 U. S. 106, 111. It is, we suggest, unreasonable to think that where such a transfer of beneficial ownership occurs, Congress intended taxability to depend upon whether there was also a technical transfer of title. As this Court observed in *Corliss* v. *Bowers,* 281 U. S. 376, 378, "taxation is not so much con-

cerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."

The contrary view of the court below that the existence of a taxable transfer depends upon whether the decedent had such title in the property under state law that upon his death the property passes as part of his estate, accords neither with the literal language nor the legislative history of Section 302 (a). Had Congress intended to tax only the transfer of title to property which passes as part of the decedent's estate, it would scarcely have used the word "interest" as the sole statutory test—a word completely inapt if intended to connote only legal or equitable titles. From 1916 until 1926, the statute was in fact confined to property interests of the decedent which were "subject to distribution as part of his estate";[8] in the Revenue Act of 1926, however, Congress deleted this provision. To construe the statute as did the court below, therefore, is to read into it a limitation for which Congress not only

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[8] During these years, the predecessor sections to Section 302 (a) of the Revenue Act of 1926 were specifically limited to an interest of the decedent at the time of his death, "which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." See Revenue Act of 1916, c. 463, 39 Stat. 756, Section 202 (a); Revenue Act of 1918, c. 18, 40 Stat. 1057, Section 402 (a); Revenue Act of 1921, c. 136, 41 Stat. 227, Section 402 (a); Revenue Act of 1924, c. 234, 43 Stat. 253, Section 302 (a).

failed to provide but which it saw fit specifically to eliminate.

Furthermore, the construction of the statute adopted by the court below leaves unanswered the critical question of why Congress would have wanted to draw a distinction for tax purposes between an owner of property and a person having substantially the same rights of enjoyment and disposition as an owner, although not his legal title. Certainly the difference in the manner by which the benefits of ownership are transferred in the case of a decedent who is a fee owner and in the case of a decedent who has substantial ownership but no title furnishes no reason for a differentiation in tax treatment. In both cases, the rights of the decedent terminate upon his death. In both cases, too, the property "passes" to another only in the sense that the expiration of the decedent's rights at his death perfects the rights of his successors in interest. Since the two types of "transfer" of ownership benefits are the same in substance,[9] there is no reason to believe that

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[9] The only difference in the two types of situations is that in the case of a fee owner, the successor is determined by the provisions of the decedent's will or by the state laws of intestacy, while in the case of the decedent in this case, the successor is determined by the provisions of his will, or, in default of testamentary appointment, by the terms of the instrument creating the trust. But this difference is plainly immaterial for tax purposes; the crucial fact is not the manner in which the decedent's successor in interest is selected, but the termination of ownership rights in the decedent and the perfection of such rights in his successor.

Congress intended to distinguish between them for tax purposes.

We earnestly submit, therefore, that since as we show below, the decedent in this case did have substantially the same rights of enjoyment and disposition of the trust property as an owner, he was properly treated for purposes of the estate tax as owner altogether.

3. AT THE TIME OF HIS DEATH, DECEDENT POSSESSED SUBSTANTIALLY ALL THE ATTRIBUTES OF OWNERSHIP OF THE TRUST PROPERTY

In determining whether decedent's interest in the trust property amounted in substance to ownership of that property, the whole "bundle of rights" which he possessed must be considered together. This Court specifically so held in the *Clifford* case, where it pointed out that "no one fact is normally decisive" and that "all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership * * *." 309 U. S. at 336. In view of the *Clifford* case, it seems clear that the court below erred in basing its decision upon the conclusion (R. 50) that, under state law,[10] no single

[10] The court below quoted from *Morgan* v. *Commissioner*, 309 U. S. 78, 80, as follows:

"State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."

The court mistakenly concluded (R. 50) that this proposition somehow supported its construction of the statute. The *Morgan* case makes it clear that the test of the meaning of

one of decedent's rights, separately considered, amounted to an "interest" in the property. None of decedent's rights existed in the theoretical isolation in which the court below examined them; they existed as a whole, and it is therefore as a whole that they must be viewed in deciding whether or not the decedent occupied the position of beneficial owner.

The holder of an absolute equitable or fee title to property has "at the time of his death" the following attributes of ownership: (A) a lifetime enjoyment of the property, to the exclusion of all others; (B) an unlimited power to dispose of the property by will to whomsoever he chooses, including his own estate or creditors; and (C) the assurance that if he fails to dispose of the property by will, it will pass by the laws of intestacy to the members of his immediate family. We believe it plain that decedent's rights in and to the trust corpora gave him, in all substantial respects, the same attributes of ownership.

A. At the time of decedent's death, there was drawing to its close a lifetime enjoyment of the trust property which rested with decedent to the

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the word "interest" in the federal tax statute is not the meaning attributed to the word under local law. Rather, that case shows that the proper inquiry is whether the word "interest," as construed independently of local law, comprehends an aggregate of rights in property such as the local law gave to decedent at the moment of his death. See also *Lyeth* v. *Hoey*, 305 U. S. 188; *Burnet* v. *Harmel*, 287 U. S. 103.

exclusion of all others. Until he reached the age of 28 he was entitled to a substantial portion of the income from the trusts and such part as was not distributed to him was accumulated. After he reached 28 he would have been entitled to receive all income accruing from the trusts created by his mother, and any income accumulated prior to his twenty-eighth year, together with the corpus, would be a source of income to be distributed to him after that time. With respect to the largest of the three trusts, that created by his father, decedent was entitled to receive the accumulated income together with the corpus outright when he reached the age of 28. In that trust, therefore, decedent had more than a life estate; he had in effect ownership of the property, possession merely being postponed until he attained the requisite age.[11]

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[11] The deficiency notice of June 11, 1938, which was sent to Safe Deposit and Trust Company of Baltimore, Trustee, and to the administrator of the estate of Smith Reynolds, includes in decedent's gross estate the assets in decedent's three trusts, as follows: In the trust created by the will of decedent's father, assets totalling \$17,378,457.55; in the trust created by the will of decedent's mother, assets totalling \$3,559,711.91; in the trust created by the deed of decedent's mother, assets totalling \$107,030.27. The notice also includes assets separated from the trust created by the father's will and held in two trusts, one for the benefit of decedent's wife Anne Cannon (assets aggregating \$459,-770.80) and one for the benefit of the Cannon child (assets aggregating \$460,438.36).

The trust for Anne Cannon was continued by the compromise and judgment entered thereon (R. 96). If the Com-

It may be urged that decedent's lifetime enjoyment was not complete because up to the time of his death part of the income was being withheld from him and he was not free to alienate the corpus. The important fact, however, is that decedent's enjoyment was at all times exclusive. No other person received the income not distributed to him, and no other person could alienate the assets of the trust, or invest its funds, except the trustees who acted for decedent in preserving and accumulating an estate which would be subject to his unfettered control at the moment of his death.

Property held by formal fee title does not escape the force of Section 302 (a) simply because of lifetime restrictions upon alienation or enjoyment. See *Landman* v. *Commissioner*, 123 F. (2d) 787 (C. C. A. 10), pending on petition for certiorari, No. 904, present Term. There an allotment of oil land held by the United States for a re-

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missioner is successful in his argument under this Point I, the case should be remanded to the Board of Tax Appeals with directions to eliminate from the gross estate the assets contained in this trust. Decedent at the time of his death did not possess rights equivalent to ownership in this trust property.

On the other hand, the trust created for the Cannon child was cancelled by the compromise judgment. Principal and accumulated income were returned to the trust created for decedent by his father's will (R. 96). The assets of this trust were therefore properly treated as part of the property in which decedent had rights amounting to ownership at the time of his death.

stricted Creek Indian, and all accumulated income therefrom, was held to be subject to the estate tax at her death, despite the fact that she could not alienate the property and received only such income as the federal officer superintending her affairs thought necessary for her maintenance and that of her family. The restrictions upon lifetime enjoyment imposed by the trust instruments in the present case are plainly no greater than those involved in the *Landman* case.

B. In addition to the ownership attribute of exclusive lifetime enjoyment of the property, decedent had an unrestricted power of testamentary disposition. The Court should note that such a power to bestow his property upon any person he chooses is the only attribute of ownership available even to an absolute fee owner "at the time of his death"—the determinative time under the statute. The decedent's power over the trust property was plainly the same in this respect as that of an absolute owner. The satisfaction of paying debts incurred for his own benefit during his lifetime was also available to the decedent, for he had the power to make the property his own by appointing it to his creditors. Cf. *Douglas* v. *Willcuts*, 296 U. S. 1; *Burnet* v. *Wells*, 289 U. S. 670.[12]

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[12] The possessor of a general power of appointment exercisable by will only may, during his lifetime, go far toward enjoying the economic fruits of the ownership of the prop-

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Emphasis has sometimes been placed upon what is said to be the common law theory of the nature of a power of appointment. This theory is that the possessor of a general power has no estate in the property; if the power is exercised, the appointees derive their title to the property from the donor of the power and nothing passes to them from the donee. Whether or not this is a correct statement of the common law theory,[13] it obviously ignores the realities of the situation. The donee of a general power of appointment has effective

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erty. Though a contract to exercise the power by will may not be enforceable in equity (*Farmers' Loan and Trust Co. v. Mortimer*, 219 N. Y. 290; Note, 30 Harv. L. Rev. 401; 3 Restatement of the Law of Property, Section 340), nevertheless the obligee may, if such a contract is not observed, recover damages or get restitution from the estate of the possessor of the power. *Matter of Rogers*, 168 Misc. (N. Y.) 633, 639; 3 Restatement of the Law of Property, Section 340 and comment. There is little difference between a right to damages and a right to restitution since a creditor entitled to restitution may get a money judgment against the estate for the sum advanced (Restatement of the Law of Restitution, Section 4 (f) and Comment (e)) and presumably has collected interest periodically prior to the decedent's death. Thus a creditor can place considerable reliance upon a contract to exercise by will a power of appointment in his favor. Furthermore, a general testamentary power may be released by the donee for a consideration. *Lyon v. Alexander*, 304 Pa. 288; see cases cited in 76 A. L. R. 1430; 3 Restatement of the Law of Property, Section 334; Note, 51 Harv. L. Rev. 1451. Thus the donee of the power and taker in default together may sell a fee interest, or the former may sell to the latter.

[13] See Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 Harv. L. Rev. 929, 932, n. 17.

control and dominion over the subject property. That is the significant fact which for tax purposes should be determinative.

This Court has frequently stated that "for purposes of taxation, a general power of appointment * * * [is] equivalent to ownership of the property subject to the power" (*Curry* v. *McCanless*, 307 U. S. 357, 371, and cases cited; *Graves* v. *Elliott*, 307 U. S. 383, 386), and that "to make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes." *Chase National Bank* v. *United States*, 278 U. S. 327, 338; *Bullen* v. *Wisconsin*, 240 U. S. 625, 630. Further, the Court has specifically pointed out that "the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death." *Chase National Bank* v. *United States*, *supra*, at 338.[14]

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[14] While the possessor of a general power exercisable either *inter vivos* or by will has greater rights during his life than the possessor of a general power exercisable only by will, he has no advantage "at the time of his death." In this connection the decision of this Court in *Curry* v. *McCanless*, 307 U. S. 357, is significant. The jurisdiction of a state to tax trust property not within its borders was there in question. The tax sought to be imposed was an estate tax and the alleged taxable event was the death of the grantor of the trust, who was a domiciliary of the state. The only basis for jurisdiction was the grantor's interest in the trust property resulting from her retention of a life estate and a general testamentary power of appointment. In sustaining the tax, this Court said (pp. 370–371): "The decedent's power

Even at common law, a life estate plus a general testamentary power was considered almost the equivalent of fee ownership. See Sugden on *Powers* (1856 ed.), Vol. 1, p. 180, *et seq.* And statutes in several states provide that a life tenant with a general power can in fact convey a fee. See Glenn, *Fraudulent Conveyances and Preferences* (Rev. ed. 1940), Vol. 1, Section 159; New York Real Property Law, Sections 149 and 152. But whether a life tenant with a general power of testamentary disposition can convey a fee or not, at the very least he enjoys the rights of ownership, subject only to a restraint on alienation similar to a spendthrift provision.[15]

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to dispose of the intangibles was a potential source of wealth which was property in her hands * * *.

"For purposes of taxation, a general power of appointment, of which the testatrix here was both donor and donee, has hitherto been regarded by this Court as equivalent to ownership of the property subject to the power. *Chanler* v. *Kelsey*, 205 U. S. 466; *Bullen* v. *Wisconsin*, *supra*, 630 [240 U. S. 625, 630]; *Chase National Bank* v. *United States*, 278 U. S. 327, 338; see Gray, *Rule Against Perpetuities* (3d ed. 1916), Sec. 524."

See also *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271; *Commissioner* v. *Prouty*, 115 F. (2d) 331, 335–336 (C. C. A. 1st).

[15] The decedent's status as owner of the property is not altered by the fact that the power was given to him by another. His interest at the time of death was the same as that of an owner who reserves a power when conveying the property. *Commissioner* v. *Prouty*, 115 F. (2d) 331 (C. C. A. 1st); *Richardson* v. *Commissioner*, 121 F. (2d) 1 (C. C. A. 2d), certiorari denied, November 10, 1941 No. 692, present Term; *Brown* v. *Commissioner*, 119 F. (2d) 983 (C. C. A. 7th); cf. *Commissioner* v. *Solomon*, decided by the Circuit

On this point, the decision of this Court in *Chase National Bank* v. *United States, supra,* seems decisive. There the Court stated (278 U. S. at 338):

> Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, *Chanler* v. *Kelsey,* 205 U. S. 466. * * * And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, *Bullen* v. *Wisconsin,* 240 U. S. 625; cf. *United States* v. *Robbins,* 269 U. S. 315, 327; *Cohen* v. *Samuels, supra.*

See also *Curry* v. *McCanless, supra,* p. 372; *Graves* v. *Elliott,* 307 U. S. 383; *Bullen* v. *Wisconsin, supra; Saltonstall* v. *Saltonstall, supra; Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 345; *Corliss* v. *Bowers,* 281 U. S. 376, 378.[16]

Court of Appeals for the Third Circuit on November 28, 1941, not yet officially reported but found in 1941 C. C. H., Federal Estate and Gift Tax Service, par. 10,111.

[16] Cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39; *Rasquin* v. *Humphreys*, 308 U. S. 54; *Helvering* v. *Hutchings*, 312 U. S. 393, 396; *Burnet* v. *Guggenheim*, 288 U. S. 280; *Tyler* v. *United States*, 281 U. S. 497; *United States* v. *Jacobs*, 306 U. S. 363.

These authorities demonstrate, we believe, that the general power of appointment possessed by the decedent at the time of his death was, in every realistic sense, a most important attribute of ownership in the trust property. They also dispose of any suggestion that decedent's rights in that respect did not pass from him to others at his death.[17]

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[17] Taxpayer died domiciled in the State of North Carolina at the age of twenty years and eight months. By the law of that state, he was prevented from passing property by will because he was under twenty-one. North Carolina Code (1931), Section 4128; cf. Section 4132. But this disability, assuming that it prevented exercise of his testamentary powers over the property, was no different from the disability under which he would have been had he held formal fee title to the property at the time of his death.

The disability did not inhere in the powers, but was imposed by the law of the state of his final domicile. An appropriate change in the statutes of North Carolina prior to decedent's death, but after the creation of the powers, would have enabled him to exercise the powers at an earlier age. Similarly, decedent might have succeeded in changing his domicile to another state where arrival at the age of 21 was not a prerequisite to the making of a valid will. If he had done so, the powers could have been exercised at the time of his death. Restatement of the Law of Conflict of Laws, Section 287; 2 Beale, *Conflict of Laws* (1935 ed.), Section 287.1, pp. 1010–1011. In more than half of the states a married male of 18 or more can make a valid will of personalty. In some states ages ranging down to 14 are sufficient. 1 Schouler, *Wills, Executors and Administrators* (6th ed.), Sec. 77.

In view of the fact that decedent could, by changing his domicile, have exercised his powers of appointment, it is clear that the disability imposed upon him by the North Carolina statute was less of a bar to his enjoyment of the rights of property ownership than it would have been had he

C. In addition to his rights of lifetime enjoyment and his power of absolute disposition upon his death, decedent had the assurance that if he failed effectively to exercise his testamentary powers of appointment the property would go to members of his immediate family who were the natural objects of his testamentary bounty, namely, his children, or, if none, his brother and sisters. Such a gift-over provision is comparable to the provision of law for the distribution of property in the event of the death of an absolute fee owner intestate. The slight discrepancy between the limitations over in the trust instruments and the intestacy statute of North Carolina [18] is, we believe,

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owned fee title to real estate in North Carolina. Had he owned such fee title he could under no circumstances have disposed of the property by will until he reached 21.

[18] Under Sections 137 and 1654 of the North Carolina Code (1931), intestate personal property is distributable first to the children and then to the next of kin of equal degree and those who legally represent them, a child being treated as the legal representative of his deceased parents. However, if there is a widow, she receives half of the estate or a child's share if there are more than two children. A parent is next of kin in the nearest degree after children. Under the wills and deed of decedent's parents, his children were the primary inheritors in default of appointment. Secondary takers, who would receive if there were no living children or descendants, were decedent's brother and sisters and the living issue *per stirpes* of any deceased brother or sister. Thus the provisions of the wills and deed of decedent's parents followed the intestacy laws of North Carolina except in failing to provide for a widow of decedent.

There are two further minor exceptions. The will of decedent's father provides for decedent's mother in the event

of no greater significance for purposes of the federal estate tax than the discrepancies between the intestacy provisions of the laws of the various states.[10] The important fact is that decedent was in substantially the same position as a fee owner in that members of his immediate family were destined to inherit the trust property in the event that he did not dispose of it by will. Cf. *Helvering v. Clifford, supra.*

The foregoing analysis demonstrates, we think, that the attributes of ownership possessed by decedent at the time of his death were substantially the same as though he had been given a fee title to the trust property, subject to restriction on

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that decedent should die without leaving living children or living brothers or sisters or the issue thereof. Under the intestacy laws decedent's mother would take before his brother or sisters if she were living at his death, which she was not. Since decedent's father died before the will and deed of his mother became effective, no provision for his father was necessary in that will or deed. However, decedent's mother's will awards to her second husband a share equal to that of a brother or sister of decedent, if decedent should die without descendants. The intestacy laws would not thus provide for a step-parent.

[10] The federal tax is an estate and not an inheritance tax; it is therefore concerned with the existence of a transfer of ownership benefits and not with the particular persons who are the transferees.

alienation and limitations as to the use of the income during his lifetime or until he reached the age of 28.[20] Under the rationale of the *Clifford* case, therefore, decedent, who was for all practical purposes the owner of the trust property at the time of his death, was properly treated as its owner for tax purposes.[21]

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[20] It is true that, had decedent been a fee owner, his creditors could have reached the trust property under state law while they could not do so under the provisions of the trusts unless the decedent exercised his powers of appointment. See *United States* v. *Field*, 255 U. S. 257. This fact, however, is not material for present purposes. This Court found ownership for federal tax purposes in the *Clifford* case even though the taxpayer's creditors could not there reach either the trust property or the income. See also *Helvering* v. *Horst*, *supra*; *Harrison* v. *Schaffner*, *supra*. It should also be noted that, by statute in some states, creditors of the possessor of a general testamentary power of appointment can reach the property subject to the power even though the power is unexercised. Glenn, *Fraudulent Conveyances and Preferences* (Rev. ed. 1940), Sections 159, 160. It should be noted, too, that in bankruptcy property which is subject to a general power exercisable *inter vivos* is available to creditors of the donee of the power. See *Cohen* v. *Samuels*, 245 U. S. 50.

[21] The dislocation of burden which would result if the estate tax on property subject to a power were collected from the estate of the donee of the power rather than the subject property is no greater than it may be under Section 302 (f), when the power is exercised, or Section 302 (b), (c), (d), or (e). The tax may, and in the instant case would be, collected out of the subject property. Section 315 (a) of the Revenue Act of 1926, as amended.

4. THERE IS NOTHING IN THE STRUCTURE OR LEGISLATIVE HISTORY OF THE ESTATE TAX LAW, OR IN THE DECISIONS AND REGULATIONS CONSTRUING IT, WHICH PREVENTS APPLICATION OF THE *CLIFFORD* RULE TO THE PRESENT CASE

The court below held Section 302 (a) inapplicable, not on the ground that decedent's rights in and to the trust property were substantially less than those of a fee owner, but on the ground that the term "interest" refers only to property to which the decedent has technical title and which therefore passes upon his death by will or intestacy. That ruling, as we have pointed out, cannot be harmonized with the rationale of the *Clifford* case. And none of the considerations to which the court below adverted in its opinion to support its conclusion justified its refusal to apply the *Clifford* doctrine.

A. The court below was influenced by the fact that Section 302 (f) of the Revenue Act of 1926 expressly provides for the inclusion in the gross estate of the decedent of the value of property passing pursuant to the exercise of a power of appointment. The court reasoned that the specific provision made by Congress for property passing under an exercised power is an indication that Congress did not intend to tax property subject to an unexercised power.

The history of Section 302 refutes this view. The provision which is Section 302 (a) of the 1926 Act first appeared in 1916 (Section 202 (a) of the Revenue Act of 1916); as originally enacted, it provided for the inclusion in gross estate of only

such interests in property as were subject to the payment of charges against the decedent's estate and the expenses of its administration, and which were subject to distribution as part of the estate.[22] The provision which is Section 302 (f) of the 1926 Act first appeared in 1918 (Section 402 (e) of the 1918 Act) and, in the words of the Committee Report, was added to the law "for the purpose of clarifying rather than extending the existing statute." H. Rep. No. 767, 65th Cong., 2d sess., p. 21.[23] Eight years later, Section 302 (a) was amended by the Revenue Act of 1926 so as to include any property interest which the decedent had at the time of his death, irrespective of whether the interest was chargeable with decedent's debts and the expenses of administering his estate, and irrespective of whether it passed as part of his estate (Section 302 (a) of the Revenue Act of 1926).[24]

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[22] See note 8, p. 23, *supra*.

[23] The Committee Report also states (p. 21): "A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner."

[24] The Committee Report pertaining to Section 302 (a) of the Revenue Act of 1926 sheds little light on the breadth of the change made. See H. Rep. No. 1, 69th Cong., 1st sess., p. 15. The amendment was not, as is sometimes believed, caused by the decision in *Crooks* v. *Harrelson*, 282 U. S. 55, holding that Missouri real estate was not covered by Section 402 (a) of the Revenue Act of 1918 because it was not subject to administration expenses. The decision in that case was not rendered until 1930; the District Court's decision was not rendered until September 13, 1928 (28 F. (2d) 510).

In view of this legislative history, it seems clear that the existence of the specific provision in Section 302 (f) does not limit the scope of the general provision in Section 302 (a). To establish the contrary, respondents must contend that Congress did not intend the combination of rights possessed by this decedent to constitute an "interest" within Section 302 (a) because, when it amended Section 302 (a) so as to broaden its scope and to make it susceptible of literal application to such a combination of rights, it failed at the same time to strike out a previously enacted provision covering part of the same field. Such a contention, we submit, does not accord with the realities of the law-making process.

Certainly the mere fact that, as we construe Section 302 (a), it overlaps Section 302 (f) does not prove that our construction is erroneous. In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, for example, this Court held that property transferred in trust subject to a power of revocation was to be included as a gift intended to take effect at death within the meaning of Section 402 (c) of the 1921 Act, even though a specific provision had been inserted in the 1924 Act to cover such a case. Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 302 (d). In other words, the Court recognized that the various subdivisions of Section 302 are not mutually exclusive.

The same approach was taken in *Burnet* v. *Guggenheim,* 288 U. S. 280, where the Court held that a transfer with a reserved power of revocation in the grantor was not subject to gift tax while that power existed, but became so when the power was surrendered. This conclusion was based upon the general provisions of the 1924 gift tax law (Sections 319, 320); it was reached despite the fact that in the 1932 gift tax law there was a specific provision covering the situation (Section 501 (c)) which, by virtue of the construction placed upon the basic provision, became superfluous. See *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 45 note.[23]

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[23] See also *Higgins* v. *Smith,* 308 U. S. 473; cf. *Douglas* v. *Willcuts,* 296 U. S. 1, 10; *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 384; *McCauley* v. *Commissioner,* 44 F. (2d) 919, 920 (C. C. A. 5th); *O'Donnell* v. *Commissioner,* 64 F. (2d) 634, 635 (C. C. A. 9th) certiorari denied, 290 U. S. 699.

We do not believe *Porter* v. *Commissioner,* 288 U. S. 436, is to the contrary, despite the reliance placed upon it by the court below. That decision held that the grantor of a trust who had reserved the power to amend it, but not to revoke it in his own favor, was constitutionally subject to estate tax under Section 302 (d) of the 1926 Act, although the trust was created before the enactment of that provision. By way of dictum the Court said (p. 442) that Section 302 (a) standing alone did not "extend to the transfers brought into the gross estate by (d)." Since the Court was considering the question whether subsection (d) was limited by subsection (a) we do not think this dictum can be taken to mean more than that subsection (a) does not extend to all of the transfers covered by subsection (d). If, however, the dictum is

Helvering v. *Clifford, supra,* is also persuasive authority in support of our position on this aspect of the case, for the statutory provisions there involved are in many respects comparable to those here involved. In that case the Court held that the income of a short-term trust, of which the grantor's wife was beneficiary, was taxable to the grantor under the general provisions of Section 22 (a) of the Revenue Act of 1934, despite the fact that Sections 166 and 167 of that Act specifically dealt with taxation to the grantor of income from various types of trusts (not including, however, income from a short-term family trust)[26] and despite the fact that the construction given to Section 22 (a) rendered the special provisions of Sec-

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to be interpreted as meaning that subsections (a) and (d) must be so construed as to eliminate any overlapping, it is, we submit, out of harmony with the weight of authoritative decisions by this Court.

Particular doubt is thrown upon the dictum in the *Porter* case by the subsequent decision of this Court in *Estate of Sanford* v. *Commissioner*, 308 U. S. 39. There the Court held that, for gift tax purposes, a gift is not complete if a power to change beneficiaries is reserved, even though the power may not be exercised in favor of the donor, and that when such a reserved power is relinquished a taxable transfer occurs. Since the gift tax statute is cast in terms similar to Section 302 (a) of the estate tax law and contains no provision comparable to Section 302 (d), the decision in the *Sanford* case cannot easily be reconciled with the dictum in the *Porter* case.

[26] See *Helvering* v. *Wood*, 309 U. S. 344.

tions 166 and 167 in large measure superfluous.[27] With respect to this matter, the Court stated (309 U. S. at 337–338):

> We should add that liability under § 22 (a) is not foreclosed by reason of the fact that Congress made specific provision in § 166 for revocable trusts, but failed to adopt the Treasury recommendation in 1934, *Helvering* v. *Wood, post,* p. 344, that similar specific treatment should be accorded income from short term trusts. Such choice, while relevant to the scope of § 166, *Helvering* v. *Wood, supra,* cannot be

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[27] For instance, a trust with a power of revocation reserved to the grantor who is trustee and whose immediate family are beneficiaries is quite evidently taxable under Section 22 (a), although it is specifically covered by Section 166. This and other examples of the overlapping between the general and special provisions will be found in the following cases: *First Nat. Bank* v. *Commissioner*, 110 F. (2d) 448 (C. C. A. 7th); *Cox* v. *Commissioner*, 110 F. (2d) 934 (C. C. A. 10th), certiorari denied, 311 U. S. 667; *Reuter* v. *United States*, 34 F. Supp. 1014 (C. Cls.), certiorari denied, 312 U. S. 695; *Reuter* v. *Commissioner*, 118 F. (2d) 698 (C. C. A. 5th); *Helvering* v. *Dunning*, 118 F. (2d) 341 (C. C. A. 4th), certiorari denied, October 13, 1941, No. 114, present Term; *White* v. *Higgins*, 116 F. (2d) 312 (C. C. A. 1st); *Kraft* v. *Commissioner*, 111 F. (2d) 370 (C. C. A. 3d), certiorari denied, 311 U. S. 671; *Whiteley* v. *Commissioner*, 120 F. (2d) 782 (C. C. A. 3d), certiorari denied, October 13, 1941, No. 516, present Term; *Helvering* v. *Elias*, 122 F. (2d) 171 (C. C. A. 2d), certiorari denied, December 8, 1941, No. 728, present Term; *Commissioner* v. *Buck*, 120 F. (2d) 775, 779, note 3 (C. C. A. 2d).

said to have subtracted from § 22 (a) what was already there. Rather, on this evidence it must be assumed that the choice was between a generalized treatment under § 22 (a) or specific treatment under a separate provision (such as was accorded revocable trusts under § 166); not between taxing or not taxing grantors of short term trusts. In view of the broad and sweeping language of § 22 (a), a specific provision covering short term trusts might well do no more than to carve out of § 22 (a) a defined group of cases to which a rule of thumb would be applied. The failure of Congress to adopt any such rule of thumb for that type of trust must be taken to do no more than to leave to the triers of fact the initial determination of whether or not on the facts of each case the grantor remains the owner for purposes of § 22 (a).

The same approach should, we think, be adopted here, for Section 302 (a), like Section 22 (a), is obviously designed as a catch-all provision, with Section 302 (f), like the comparable Sections 166 and 167 of the income tax law, simply carving out of Section 302 (a) "a defined group of cases to which a rule of thumb should be applied." In the present type of situation there is no such rule of thumb, but, as the Court pointed out in the *Clifford* case, that means simply that there must be a determination on the facts of each case whether the decedent should be treated

as the owner at the time of his death for purposes of Section 302 (a).[28]

B. The decision of this Court in *United States* v. *Field,* 255 U. S. 257, which was the authority principally relied upon by the court below is, we believe, distinguishable. The decedent in that case was the life beneficiary of a trust and also had a general testamentary power to appoint the income from the trust property which would accrue between the date of her death and the termination of the trust; she had no power, however, to dispose of the property itself. By her will she appointed the right to receive the income. The Commissioner sought to include the value of that right in the decedent's gross estate under Section 202 (a) of the Revenue Act of 1916, a predecessor section of Section 302 (a), which, however, as we have pointed out, specifically referred only to an interest of the decedent "which after his death is

[28] Mr. Justice Douglas referred to the ownership question as one "for the triers of fact." In the present case all of the pertinent facts appear in the basic trust instruments which are of record. The question raised by our contention simply involves the application of the statute to the known facts. This is a question of law. *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481; *Deputy* v. *DuPont*, 308 U. S. 488, 499; *Harrison* v. *Schaffner*, 312 U. S. 579; *Commissioner* v. *Buck*, 120 F. (2d) 775, 779 (C. C. A. 2d); *Rubinkam* v. *Commissioner*, 118 F. (2d) 148 (C. C. A. 7th); cf. *Crabb* v. *Commissioner*, 121 F. (2d) 1015 (C. C. A. 5th); *Commissioner* v. *Goulder* (C. C. A. 6th), decided December 2, 1941, not yet reported; but may be found in 1941 C. C. H., Vol. 4, par. 9777.

subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." At the time of the death of the decedent involved in the *Field* case, there was no provision of the estate tax law comparable to the present Section 302 (f), expressly requiring the inclusion of property passing pursuant to the exercise of a general power.

This Court held that the value of the right was not includible in the decedent's gross estate. The Court pointed out that under Section 202 (a) of the 1916 Act property rights were not taxable unless three conjunctive conditions were met, namely, (1) that the decedent had an interest at the time of his death, (2) that, after his death, this interest was subject to the payment of charges against his estate and the expenses of its administration, and (3) that the interest was subject to distribution as part of his estate. Since the property which passed pursuant to the decedent's exercise of her power did not pass as part of her estate and was not subject to the payment of her debts, the Court concluded that the limiting conditions of the statute were not met and that the transfer was therefore not taxable. Since these limiting conditions were deleted in the 1926 Act here applicable, we do not believe that the *Field* case can fairly be regarded as authority against our position.

There are, it is true, two isolated statements in the *Field* opinion which furnish some support for the view, expressed by the court below, that the decision in that case was rested, not only on the ground that the property subject to Mrs. Field's power did not pass as part of her estate and was not subject to the payment of her debts, but also on the broader ground that Mrs. Field had no "interest" in the property in the statutory sense. These statements are that "the existence of the power does not of itself vest any estate in the donee" (p. 263) and that the "interest in question" was not "property of Mrs. Field at the time of her death" (p. 264). We do not believe, however, that these two statements can be magnified into a holding that one who has a combination of rights such as that possessed by decedent here has no "interest" in the property subject to the power, particularly in the light of the emphasis placed in the opinion upon the view that the statute was rendered inapplicable by reason of its limiting conditions.

But even if the decision is to be so construed, it is distinguishable. For the "interest" which was referred to in Section 202 (a) of the 1916 Act was an interest "which" was qualified by the restrictions we have mentioned. Removal of the restrictions in the 1926 Act accordingly served to broaden the meaning of the word "interest"; indeed, unless it served to do so, the deletion of the limiting con-

ditions would have been largely ineffective. Consequently, a holding that the decedent in the *Field* case had no "interest" within the meaning of Section 202 (a) of the 1916 Act would not be authority for the proposition that she would have had no interest in the broader sense of that word as it appears in Section 302 (a) of the 1926 Act.

We believe, therefore, that the decision of the court below finds no support in the *Field* case. But if we are in error as to this and the *Field* case is properly to be construed as ruling that the term "interest," even as used in Section 302 (a) of the 1926 Act, applies only to a legal or equitable title in property, then the decision, we believe, is wrong in principle and should be overruled. For, so construed, the *Field* case is directly opposed to the subsequent decisions of this Court in the *Clifford* case and in the other cases which we have cited, to the effect that taxation is concerned with the control or transfer of economic benefits to property rather than with the technicalities of title, and that, therefore, one who has all the substantial attributes of ownership must, for tax purposes, be treated as owner altogether. See pp. 20–23, *supra*.

C. The court below was also influenced (R. 49) by decisions interpreting Section 302 (f) in which the present contention of the Government might have been made, but was not. *Helvering* v. *Grinnell*, 294 U. S. 153; *Morgan* v. *Commissioner*, 309 U. S. 78; *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760 (C. C. A. 4th); *Rothensies* v. *Fidelity-*

Philadelphia Trust Co., 112 F. (2d) 758 (C. C. A. 3d). These cases are not precedents in any way decisive of the present controversy concerning the proper construction of Section 302 (a), for the very reason that the question was not there raised or considered. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Mitchell*, 271 U. S. 9, 14.[20]

D. The court below referred to Articles 13 and 24 of Treasury Regulations 80 (1937 edition) (Appendix, pp. 62-65, *infra*), as supporting its decision. Article 24 deals exclusively with the applicability of Section 302 (f) and is of no assistance in the interpretation of Section 302 (a). And there is nothing in Article 13 which attempts to pass upon the applicability of Section 302 (a) to rights of dominion and enjoyment such as those possessed by the decedent in this case. Statements in the fourth paragraph of that article to the effect that the gross estate should not include a life estate or any increment of value by reason of a contingent remainder which ceases at death, certainly are not significant, since they refer to isolated rights of a far less substantial character than those of the decedent here. It may be observed, too, that the 1937 edition of Regulations 80 has been superseded by a newer edition of estate tax regulations which are applicable to the present

[20] The mere failure to raise the question in those cases is not sufficient evidence of an administrative practice to be of any substantial weight in settling the present controversy. Cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39.

case and which omit these statements. Treasury Regulations 105, Section 81.13, Appendix, *infra*, p. 59.[30]

II

SOME PART OF THE PROPERTY ACQUIRED BY DECEDENT'S BROTHER AND SISTERS IN THE COMPROMISE MUST BE DEEMED TO HAVE PASSED TO THEM UNDER POWERS OF APPOINTMENT EXERCISED BY DECEDENT WITHIN THE MEANING OF SECTION 302 (f) OF THE 1926 ACT, AS AMENDED

Should this Court hold that we are wrong in our contention that the entire corpus of each trust

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[30] Respondents may seek to place some reliance on Article 2 of the 1937 edition of Treasury Regulations 80 (Appendix, p. 61, *infra*), which stated that "In addition to property passing under a will or the intestate laws, the gross estate for purpose of the estate tax includes" certain interests of the kind specified in the subsections of Section 302 which follow subsection (a). This statement was obviously not cast with a view of determining the precise scope of Section 302 (a) and would, therefore, be of little force even if applicable to the present case. The fact is, however, that this regulation was not in effect at the time of decedent's death, or, in fact, at any time prior to the promulgation of the 1937 edition. Article 2 of the 1934 edition of Regulations 80 (Appendix, p. 65, *infra*) began "The statute subjects to tax transfers resulting from the decedent's death" and then proceeded to discuss specific types of interests covered by the subsections following Section 302 (a). Article 2 of the 1926 and 1929 editions of Regulations 70 were similarly worded. And Section 81.3 of Treasury Regulations 105 (Appendix, p. 59, *infra*), which corresponds to Article 2 of the earlier regulations, has abandoned the 1937 form and provides, in substance, that in addition to interests in the property possessed by the decedent at the time of his death, the gross estate shall include certain specified types of transfers.

should be included in decedent's gross estate under Section 302 (a), the question would remain whether all or some part of the 37½ percent of the trust property allotted to decedent's brother and sisters in the compromise should be included in his gross estate under Section 302 (f), as property passing pursuant to exercised powers of appointment. We think that it should be so included because decedent, in his New York will, sought to exercise his powers of appointment in favor of his brother and sisters, and they received a share of the trust property in the compromise, in part, at least, by asserting their rights as appointees under that will. Under the controlling decision of this Court in *Lyeth* v. *Hoey*, 305 U. S. 188, that part of the trust property received by the brother and sisters in the compromise through the assertion of their claims as appointees must be treated as though it passed pursuant to an effective exercise of decedent's powers.

In the *Lyeth* case an heir of a decedent contested the validity of the decedent's will in which no provision had been made for him. A compromise was entered into under which the will was probated and a specified sum paid to the heir. This Court held that the heir had acquired the property "by inheritance." The theory of the decision was that a person who had no standing to make a claim except as heir, and who acquired property by asserting that claim, must be considered as acquiring the property for tax pur-

poses in his capacity as heir. Similarly here, so much of what the brother and sisters obtained in the compromise by asserting their claim as appointees under decedent's will would seem, for tax purposes, to come to them as such appointees and, therefore, to have passed pursuant to exercised powers of appointment within the meaning of Section 302 (f).

The court below attempted to avoid the doctrine of *Lyeth* v. *Hoey* by determining (1) that the New York will was void; (2) that, since the will was void, nothing could have passed pursuant to the exercise of the powers of appointment in the will; and (3) that the compromise in fact repudiated rather than recognized the right to take by appointment. This approach, we believe, is a complete distortion of the *Lyeth* v. *Hoey* rule.

The brother and sisters asserted the validity of the will and their rights as appointees under the will in the North Carolina proceedings. Had they succeeded in their contention, they would have been entitled to the entire trust property; had their contention been rejected, and their alternative contention rejected as well, they would have received nothing. They preferred, as did the other parties to the proceeding, to compromise their claim rather than litigate it in the North Carolina courts. Certainly, in this situation, it is not for the federal court considering the tax consequences of the compromise to de-

termine, as did the court below, that one of the contentions compromised was without merit and therefore could not have contributed to the settlement. Under the doctrine of *Lyeth* v. *Hoey,* the brother and sisters, having claimed, in part at least, as appointees, and having acquired trust property by virtue of that claim, must be considered as taking as appointees even though the appointment now be deemed invalid. See *Thompson's Estate* v. *Commissioner,* 123 F. (2d) 816 (C. C. A. 2d); *Sage* v. *Commissioner,* 122 F. (2d) 480 (C. C. A. 3d), certiorari denied, January 5, 1942, No. 760, present Term; *Benfield* v. *United States,* 27 F. Supp. 56 (C. Cls.); *Markwell's Estate* v. *Commissioner,* 112 F. (2d) 253, 255 (C. C. A. 7th).

This would be entirely clear had the compromise taken the form of an agreement to probate the New York will, with the brother and sisters paying over to the other interested parties a portion of the property which they would then have received under the exercise of the powers in that will. Had this been done, it would plainly not have been the function of the Board of Tax Appeals, or the Circuit Court of Appeals in reviewing its decision, to relieve the estate from tax because under its own analysis of the facts and the local law the powers were not validly exercised. No different result should follow here simply because the compromise was carried out in a different form.

The view expressed in the opinion below that, since the New York will was void, it could not have been a factor in the compromise, is not supported by the record.[31] In its opinion approving the compromise, the Supreme Court of North Carolina refers (R. 115–116) to the question of—

> The validity and effect of the alleged will executed in New York by Zachary Smith Reynolds, as a basis of the offer of the brother and sisters of Zachary Smith Reynolds.

It is described as a "serious," "grave" and "troublesome" question, and as one of the "vital bona fide controversies" in the case (R. 115). This question is then discussed in detail (R. 115–117). The following quotations from the discussion are significant (R. 117):

> Zachary Smith Reynolds attempted to execute a will leaving his property to his

[31] If their claim as appointees was not a factor in the compromise, decedent's brother and sisters made an incredibly good bargain. Their alternative contention was extremely tenuous. It depended upon successful maintenance of each of the following points: that the judgment barring the Cannon child from participation in the trusts was valid; that the Reno divorce of Anne Cannon was invalid, although both parties and the Cannon child were represented at the divorce proceedings, and although both parties subsequently relied upon the decree by remarrying; that decedent's marriage to Libby Holman was bigamous and the Holman child therefore illegitimate; and that, being illegitimate, the Holman child could not be called decedent's "descendant," "issue," or "child" within the gift-over provisions of the trusts.

> brother and sisters, as before stated. The brother and sisters make the offer of settlement. * * * This compromise judgment is not making a new will for R. J. Reynolds, but adjusting the differences brought about by his son, Zachary Smith Reynolds, attempting to do what under the wills and deed he had a right to do. * * *

In a previous case the Supreme Court of North Carolina had considered a dispute between the guardians of the Cannon child as to whether the judgment barring that child from participation in the trusts should be contested. *In re Reynolds*, 206 N. C. 276. The guardians were authorized to attempt to upset the judgment. In an opinion of Judge Clarkson it was stated that decedent's New York will was void. 206 N. C., at 290. However, the will was not at issue in that case and none of the other four judges concurred in that opinion. It was Judge Clarkson who wrote the subsequent opinion of the same court approving the compromise and stating that the validity of the New York will was a serious and bona fide question. With respect to his previous opinion, Judge Clarkson said in his second opinion (R. 128):[32]

> In the former opinion of this Court (206 N. C., 276–290), on the appeal of the Cabar-

[32] The record in the present case has quotation marks misplaced. The above quotation is correct. *Reynolds* v. *Reynolds*, 208 N. C. 578, 630.

rus Bank and Trust Company, coguardian of Anne Cannon Reynolds II, we said in the main opinion: "The alleged will of Zachary Smith Reynolds appears to be inoperative and void." The wills and deed of the parents of Zachary Smith Reynolds gave him the right to make a will—exercising the power of appointment given him was one of the serious and *bona fide* questions that brought about the compromise. He made the will in controversy to his brothers and sisters, who made the "offer of settlement."

With such strong evidence that the argument for the validity of decedent's New York will contributed to the compromise shares obtained by the brother and sisters, it was not for the court below to decide that their entire shares were obtained by advancing the alternative argument.[23] The rela-

[23] Evidence that the claim of valid appointment did not contribute to the settlement shares acquired by decedent's brother and sisters was found by the Circuit Court of Appeals in the order of the lower North Carolina court and of the Baltimore City Court approving the compromise (R. 51–52). Neither of those courts wrote an opinion. In the order of the Baltimore City Court it is expressly stated that decedent's New York will was invalid (R. 35). In the judgment of the lower North Carolina court there is similar language, together with a provision awarding to the brother and sisters, not outright, but in trust under their father's will, the settlement shares obtained by them in the trust property given decedent by that will (R. 89, 99–100). It is common knowledge, however, that such orders are generally drafted by counsel for the interested parties, who would

tive contribution of each of the two claims was a question of fact which could only be determined by the Board of Tax Appeals. *Helvering* v. *Rankin*, 295 U. S. 123, 131–132. The Board did not decide that question since it considered that the doctrine of *Lyeth* v. *Hoey* should under no circumstances be applied.

Consequently, if this Court rejects the contention of the Commissioner under Point I, *supra*, it should nevertheless remand the case to the Board of Tax Appeals with directions to determine what part of the compromise share of the brother and sisters of decedent was obtained by asserting the validity of decedent's New York will as an exercise of the powers of appointment granted to him. *Helvering* v. *Rankin*, *supra*. The Board of Tax Appeals should be instructed that the portion of the property thus ascertained is to be included as part of the decedent's gross estate under Section 302 (f) of the Revenue Act of 1926, as amended.

naturally be inclined to minimize any factors likely to increase federal taxes.

The opinion of the Supreme Court of North Carolina, whose duty it was to protect the infant children of decedent, is the only reliable touchstone for appraisal of the factors contributing to the compromise. As pointed out, that court rested its approval very heavily upon the claim of the brother and sisters to be the appointees under a valid will of decedent. Clearly that opinion is of far more significance than the order of the lower court which it affirmed, or the order of the Baltimore Court which, without re-examining the merits, merely adopted the compromise which it had approved.

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1942.

APPENDIX

Treasury Regulations 105:

SEC. 81.3. *Gross estate.*—In addition to the general provisions of subsection (a) of section 811 requiring the inclusion in the gross estate of property (except real property situated outside the United States) to the extent of the interest therein of the decedent, other subsections of section 811 more specifically include the gross estate for the purpose of the estate tax as more fully explained hereafter in these regulations, certain transfers made during the decedent's life without an adequate and full consideration in money or money's worth, joint estates with right of survivorship, tenancies by the entirety, life insurance even though payable to beneficiaries other than the estate, property over which the decedent exercised a general power of appointment and dower or curtesy of the surviving spouse or statutory estate in lieu thereof. * * *

SEC. 81.13. *Property of decedent at time of death.*—It is designed by the foregoing provisions of the Internal Revenue Code that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situated outside the United States.

All real property situated in the United States and owned by the decedent at the

date of his death is included in the gross estate, whether the decedent was a resident or a nonresident, a citizen or not a citizen, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. All personal property owned by the decedent at the date of his death is included in the gross estate, regardless of its situs. However, in the case of a decedent who was a nonresident not a citizen, only the property situated in the United States is included in the net estate and property situated outside the United States need not be disclosed unless deductions are claimed or such information is specifically requested. (See sections 81.52, 81.53, 81.54, and 81.66.) As to the situs of the personal property of decedents who were nonresidents not citizens, see section 81.50.

* * * * *

SEC. 81.24. *Property passing under general power of appointment.*—Property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor), if the power is exercised by will. It should also be so included if the power is exercised by deed or other instrument either (1) in contemplation of death, (2) with the intent that the transfer shall take effect in possession or enjoyment at or after the death of the donee of the power, (3) with the retention or reservation by the decedent of the use, possession, right to the income, or other enjoyment of the transferred property, or (4) with the retention or reservation by the decedent of the right to designate the per-

son or persons who shall possess or enjoy the transferred property or the income thereof. (For description of such transfers and the taxability thereof with reference to when made and when the death occurred, see sections 81.16, 81.17, 81.18, and 81.19.) The statute, however, does not require inclusion in the gross estate of the appointed property in the case of a bona fide sale thereof by the donee of the power for an adequate and full consideration in money or money's worth.

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power, or, however limited as to the persons or objects in whose favor the appointment may be made, is exercisable in favor of the donee, his estate, or his creditors. Duplicate copies of the instrument granting the power and of the instrument by which the power was exercised, one of each to be certified or verified, must be filed with Form 706 in all cases, unless the decedent was a nonresident, in which case only one copy of each instrument, certified or verified, is required. The copies must be filed even though it is contended that the power was a limited one and the property passing thereunder is not returned for tax.

Treasury Regulations 80 (1937 edition):

ART. 2. *Transfers and interests reached.*—In addition to property passing under a will or the intestate laws, the gross estate for the purpose of the estate tax includes, as more specifically explained hereafter in these regulations, certain transfers made during the decedent's life without an adequate and full consideration in money or

money's worth, joint estates with right of survivorship, tenancies by the entirety, life insurance even though payable to beneficiaries other than the estate, property over which the decedent exercised a general power of appointment, and dower or curtesy of the surviving spouse, or statutory estate in lieu thereof.

* * * * *

ART. 13. *Property of decedent at time of death.*—It is designed by the foregoing provision of the statute that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situated outside the United States.

If the decedent died prior to 10:25 a. m., eastern standard time, February 26, 1926, the test which determines that a given interest is to be included in the gross estate under the provisions of subdivisions (a) of the corresponding sections of the Revenue Acts prior to that of 1926 is whether the property, after death, shall be subject to: (1) Payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribution as a part of the estate. This test is not applicable if the decedent died subsequent to the effective date of the Revenue Act of 1926.

All real property situated in the United States and owned by the decedent at the date of his death should be included in the gross estate, whether the decedent was a resident or a nonresident, a citizen or an alien, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs

or devisees. If the decedent was a resident (or a nonresident citizen who died after the enactment of the Revenue Act of 1934), all personal property owned by him should be included, wherever situated. If the decedent was a nonresident alien (or, regardless of citizenship, was a nonresident who died prior to the enactment of the Revenue Act of 1934), so much of his personal property as had its situs in the United States at the time of his death should be included, and the value of his entire gross estate, wherever situated, should be disclosed, if deductions are claimed. (See articles 52 to 54). As to the situs of the personal property of nonresident alien decedents, or nonresident decedents, regardless of citizenship, who died prior to the enactment of the Revenue Act of 1934, see article 50.

The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder in the case the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included on account of an interest or an estate limited for the life of the decedent. There should be included, however, the value of a reversionary interest retained by the decedent, which reverts upon the termination of a particular estate or in case of his prior death passes to others. There should also be included the value of an annuity payable to, or an interest or an estate vested in, the decedent for the life of another person who survives him. For rules in valuing such remainders, annuities, and interests or estates *pur autre vie*, see article 10 (*i*).

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ART. 24. *Property passing under general power of appointment.*—Property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor), if the power is exercised by will. It should be so included if the power is exercised by deed or other instrument in contemplation of death. It should also be so included if the power is exercised by deed or other instrument with the intent that the transfer shall take effect in possession or enjoyment at or after the death of the donee of the power. (For description of transfers made in contemplation of death and transfers included in the phrase, "intended to take effect in possession or enjoyment at of after * * * death," and the taxability thereof with reference to when made and when the death occurred, see articles 16, 17, 18, and 19.) The statute, however, does not require inclusion in the gross estate of the appointed property in the case of a bona fide sale thereof by the donee of the power for an adequate and full consideration in money or money's worth.

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power, or, however limited as to the persons or objects in whose favor the appointment may be made, is exercisable in favor of the donee, his estate, or his creditors. Duplicate copies of the instrument granting the power and of the instrument by which the power was exercised, one of each to be certified or verified, must be filed with Form 706 in all cases, unless the decedent was a nonresident, in which case only one copy of

each instrument, certified or verified, is required.

Treasury Regulations 80 (1934 edition):

ART. 2. *Transfers and interests reached.*—The statute subjects to tax transfers resulting from the decedent's death. Except bona fide sales for an adequate and full consideration in money or money's worth, it also subjects to tax transfers made by the decedent in his lifetime (1) if made in contemplation of death; or (2) if intended to take effect in possession or enjoyment at or after his death, as for example, in the case he retained the income of the transferred property or the right thereto for his life, or for any period not ascertainable without reference to his death, or for any period of such duration as to evidence an intention to retain the enjoyment throughout his life; or (3) if he retained for any such period, either alone or in conjunction with any other person or persons, the right to designate those who should possess or enjoy the transferred property or the income therefrom; or (4) if at his death the enjoyment of the transferred property was subject to any change through the exercise of a power by him alone or in conjunction with any other person or persons to alter, amend, or revoke, or in the case such a power was relinquished by him in contemplation of his death.

There are also subject to tax the homestead and other exemptions; dower, curtesy, or statutory estate in lieu thereof, of the surviving spouse; property held by the decedent and another person or persons if the survivor or survivors take by right of survivorship; property passing under a

general power of appointment exercised by the decedent; insurance receivable by the executor under policies taken out by the decedent upon his life, and insurance so taken out and receivable by all other beneficiaries to the extent that the aggregate amount thereof exceeds $40,000.

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